Supreme Court, U. S.
FILED
AUG 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I.

Every governmental body which has looked carefully at the facts in recent years has concluded that blanket licensing is a reasonable and lawful response to the unique problems of licensing music performance rights:

> (1) The Department of Justice, in consent decrees approved by the United States District Court for the Southern District of New York, required that ASCAP and BMI offer blanket licenses (*United States* v. *ASCAP*, [1950-1951] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950); *United States* v *BMI*, [1966] Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966));
>
> (2) The United States Court of Appeals for the Ninth Circuit held, in a suit involving a broadcaster, that blanket licensing does not unreasonably restrain

trade (*K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968));

(3) The Solicitor General of the United States told this Court in a brief *amicus curiae* on the petition for certiorari in *K-91, supra*, that blanket licensing did not unreasonably restrain trade;

(4) The Congress approved blanket licensing in enacting the new Copyright Act (17 U.S.C. §§ 111, 116);

(5) The Register of Copyrights recommended to Congress that performance rights in sound recordings be created and licensed on a blanket basis (43 Fed. Reg. 12,763, 12,767 (1978));

(6) The Copyright Royalty Tribunal recently found blanket licensing to be "the most suitable method for licensing public broadcasting to perform musical works." (43 Fed. Reg. 25,068, 25,069 (1978));

(7) Finally, the District Court here concluded, after an exhaustive analysis of an extensive record, that blanket licensing imposed no unreasonable restraint of trade (A.24a-121a).

Only the Second Circuit—which refused to look at the facts—has come to a contrary conclusion. Indeed, on the petitions for rehearing, Judge Moore, who had earlier noted his disagreement with the majority's price fixing ruling, stated that the evidence did not support the majority's suppositions. (A.23a, 125a.) Without looking at the facts, the Second Circuit has held unlawful a form of licensing which has been relied upon by composers, publishers and users of music throughout the world for more than forty years.

CBS' attempt to defend the Second Circuit's failure to consider the realities of the market place is nothing more than a lengthy exercise in name-calling. Repeatedly calling someone a "price fixer" does not make it so; the uncontroverted facts of record show clearly that BMI and its affiliates do no price fixing whatsoever.

In its single brief in response to the separate petitions of BMI and ASCAP, CBS has once again sought to obscure the material differences between the two performing rights organizations. In lumping it together with ASCAP, CBS has once again described BMI in terms which simply have no application to it. BMI is not "a nationwide combination of sellers"; it is not run by a "central Committee" for "otherwise competing sellers"; it has no "membership"; its prices are not the result of "otherwise competing sellers" agreeing "to sell at a price"; and its repertory was not "pooled by a multitude of otherwise competing sellers." (CBS Brief, 4, 6, 7, 9, 10, 18.) BMI is an independent middleman in which writers and publishers play no management role. BMI's pricing decisions are BMI's alone; writers and publishers play no part in them. Prior to the decision of the Second Circuit, no case had ever held that conduct of the kind engaged in by BMI and its affiliates is price fixing.

II.

CBS' characterization of the Second Circuit's ruling on copyright misuse as one which is "of . . . little consequence to this case" and one which "plainly fails to provide an independent basis" for review by this Court could hardly be more inaccurate. (CBS Brief, 9n.) In fact, many millions of dollars in license fee revenues and the very

existence of the performing rights organizations are placed in doubt as a direct consequence of this ruling:

1. BMI has sued CBS for $4,917,508 in license fees due under the license in effect prior to the commencement of this litigation (*Broadcast Music, Inc.* v. *CBS Inc.*, No. 573/1975 (N.Y. Sup. Ct. N.Y. Cty.)). CBS has pleaded copyright misuse as a defense and has moved for summary judgment on that ground.

2. During the pendency of this litigation, CBS has paid BMI under a court order under which either party may move for retroactive adjustment of the fee to reflect the determination of the case on the merits. CBS has paid BMI more than $13 million over the past nine years on such terms. If CBS had paid at the rate voluntarily agreed to by another television network, it would have paid BMI more than $22 million.

3. While the Second Circuit may have assumed that its copyright misuse ruling—a single sentence contained in a footnote—was applicable only to television networks, the misuse defense, as it has developed in the patent field, may be relied on by any user, even if it is not a target of the misuse. The Second Circuit's misuse ruling is already having a significant effect on BMI in negotiations with licensees and in copyright suits against infringers. The potential result of increasing resort to the misuse doctrine by music users is clear: the destruction of the music licensing organizations well before any proceedings on "relief" in this case are completed.

This is not just another case in one field of business; it is *the* case. The more than 33,000 writers affiliated with BMI, the 16,000 writers who are members of ASCAP, and the thousands of writers associated with foreign performing rights organizations (whose works are made available in this country through BMI or ASCAP) include nearly all the professional composers in the world. The livelihoods of the members of an entire profession are at stake on this petition.

August 11, 1978

Respectfully submitted,

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